No. 15-674

In The
Supreme Court of the United States

UNITED STATES, *et al.*,

Petitioners,

v.

TEXAS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR *AMICI CURIAE* SAVE JOBS USA AND THE WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici submits this brief in support of their own interests as plaintiffs in ongoing federal court cases that share a key issue raised in the government's Petition for a Writ of *Certiorari* and who would be prejudiced if the writ be granted without *Amici*'s interests being taken into account. *Amici* are plaintiffs in separate lawsuits against the United States Department of Homeland Security (DHS) that are progressing in the District of Columbia Circuit. Their cases involve the same issue at the heart of *Texas* v. *United States*: Does 8 U.S.C. § 1324a(h)(3) confer authority on DHS to define the *classes* of aliens who may reside and work in the United States?[2] The answer to the question has widespread ramifications for our immigration system and would directly affect the cases brought by *Amici*.

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[1] All parties received timely notice of the intent to file and have consented to the filing of an *amicus curiae* brief by *Amici* Save Jobs USA and the Washington Alliance of Technology Workers. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *Amici*, their respective members, or their respective counsel made a monetary contribution to the preparation or submission of this brief. *Amici* do not have a parent corporation, and no publicly held company owns 10% or more of *Amici*'s stock.

[2] DHS clearly has the authority to allow *individual* aliens within classes defined by Congress to work. Therefore, its new claim that § 1324a(h)(3) also creates coequal authority with Congress to define those *classes* of aliens who may work is tantamount to asserting DHS has the authority to allow *any* alien of its choosing to work.

Amicus Save Jobs USA is a group of American computer professionals who worked at Southern California Edison until they were replaced by foreign guestworkers possessing H-1B visas. *Save Jobs USA* v. *United States Dep't of Homeland Security* is an Administrative Procedure Act (APA) challenge to DHS regulations granting work authorization to the spouses of certain H-1B guestworkers. No. 1:15-cv-00615 (D.D.C.). In promulgating the 2015 regulations at issue, DHS claimed that its authority to grant work authorization to any alien of its choosing arose from 8 U.S.C. § 1324a(h)(3).[3] Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214, 274a). That case has been fully briefed on cross-motions for summary judgment and submitted for decision to the district court. An appeal to the United States Court of Appeals for the D.C. Circuit is likely to be filed by the losing party.

Amicus the Washington Alliance of Technology Workers, Local 37083 of the Communication Workers of America, the AFL-CIO (Washtech), is a union that

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[3] The Petition describes its interpretation that the definition of the term *unauthorized alien* in § 1324a(h)(3) is a grant to DHS of unlimited authority to allow any alien of its choosing to work as being "longstanding." Pet. pp. 5, 13, 26-26. In point of fact, this 2015 rule was the very first regulation that cited § 1324a(h)(3) as conferring such authority. That is why this question, having widespread implications for the immigration system, is only now being addressed in the courts (and in multiple cases).

represents American technology workers throughout the United States. In 2014 it brought an APA challenge to DHS regulations authorizing aliens to work on student visas after graduation. *Wash. Alliance of Technology Workers* v. *United States Dep't of Homeland Security*, No. 1:14-cv-529 (D.D.C.). In briefing before the district court, DHS asserted § 1324a(h)(3) conferred on the agency authority to define classes of aliens to work in the United States. *Wash. Alliance of Technology Workers*, Defendant's Motion for Summary Judgment, ECF 27, p. 5 (D.D.C. Mar. 6, 2015).

The district court held the regulations at issue were within DHS authority but vacated them because DHS failed to give notice and comment. Washtech appealed the holding that the regulations were within DHS authority and the case is now being briefed in the United States Court of Appeals for the D.C. Circuit. *Wash. Alliance of Technology Workers* v. *United States Dep't of Homeland Security*, No. 15-5239 (D.C. Cir.). DHS has since proposed a new rule to replace the rule vacated by the district court that cites § 1324a(h)(3) as authority to allow nonstudents to work in the United States on student visas. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 80 Fed. Reg. 63,376-404 (proposed Oct. 9, 2015).

SUMMARY OF THE ARGUMENT

The question of whether 8 U.S.C. § 1324a(h)(3) permits DHS to define classes of aliens who may work in the United States is a central issue in the case at bar. It is also the central issue in both the *Save Jobs USA* and *Wash. Alliance of Technology Workers* cases. Similar issues are also currently being litigated in the Ninth Circuit case *Ariz. Dream Act Coal.* v. *Brewer*. The case at bar is merely an appeal from an order granting a preliminary injunction, whereas, in contrast, the *Wash. Alliance of Technology Workers* case is on appeal from a final judgment, the *Save Jobs USA* case has been submitted for final judgment, and the *Ariz. Dream Act Coal.* v. *Brewer* case is on appeal from a final judgment. These other cases are further advanced procedurally than this matter and have developed and fully complete records. This Court should consider the procedural state, facts, and issues raised in these other cases as it considers whether to grant the writ of *certiorari* here and the scope of review. Otherwise, these other parties' interests would be prejudiced.

ARGUMENT

I. Other cases that address the same issues are further advanced procedurally than this matter and have developed and fully complete records.

The Court "generally await[s] final judgment in the lower courts before exercising [its] *certiorari*

jurisdiction." *Va. Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring, respecting the denial of *certiorari*). The government argues against this defect in its petition by claiming that, "It is unlikely any other court of appeals will address the questions presented here." Pet. p. 34. Not only is this statement to the Court highly misleading, but it also is prejudicial to other parties currently litigating the same issues in the federal courts.

In 2015, *Amicus* Save Jobs USA brought an APA challenge to DHS regulations granting work authorization to the spouses of certain H-1B guestworkers. *Save Jobs USA* v. *United States Dep't of Homeland Security*, No. 1:15-cv-00615 (D.D.C.). In promulgating the 2015 regulations at issue, DHS claimed its authority to grant work authorization to any alien of its choosing arose from 8 U.S.C. § 1324a(h)(3). Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214, 274a). That case has been fully briefed on cross-motions for summary judgment and submitted for decision to the district court. An appeal to the United States Court of Appeals for the D.C. Circuit is likely to be filed by the losing party.

In 2014, *Amicus* Washtech brought an APA challenge to DHS regulations authorizing aliens to work on student visas after graduation. *Wash. Alliance of Technology Workers* v. *United States Dep't of Homeland Security*, No. 1:14-cv-529 (D.D.C). In briefing before the district court, DHS asserted § 1324a(h)(3) conferred on the agency authority to define classes of

aliens to work in the United States. *Wash. Alliance of Technology Workers*, Defendant's Motion for Summary Judgment, ECF 27, p. 5 (D.D.C. Mar. 6, 2015).

The district court held the regulations at issue were within DHS authority but vacated them because DHS failed to give notice and comment. Washtech appealed the holding that the regulations were within DHS authority and the case is now being briefed in the United States Court of Appeals for the D.C. Circuit. *Wash. Alliance of Technology Workers* v. *United States Dep't of Homeland Security*, No. 15-5239 (D.C. Cir.). DHS has since proposed new rules to replace the vacated rule that also cite § 1324a(h)(3) as authority to allow nonstudents to work in the United States on student visas. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 80 Fed. Reg. 63,376-404 (proposed Oct. 9, 2015).

Amici's cases involve the same central issue as this case: Whether § 1324a(h)(3) confers on DHS coequal authority with Congress to authorize any class of alien to work in the United States. Compare Pet. p. 13 ("Indeed, the [Immigration and Nationality Act] INA for decades has made clear that the determination of which aliens are authorized to be hired lawfully may be made 'by the [Secretary].' 8 U.S.C. § 1324a(h)(3).") and Pet. p. 23 ("And [Immigration Reform and Control Act] IRCA reinforces that point by confirming that 'the [Secretary]' may decide whether an alien may be lawfully hired. 8 U.S.C.

1324a(h)(3).”), with *Wash. Alliance of Technology Workers*, Defendant’s Motion for Summary Judgment, ECF 27 at 5 (“Congress also delegated responsibility to the Attorney General to determine which aliens are ‘authorized’ for employment in the United States. *Id.* (8 U.S.C. § 1324a(h)(3)).”), and *Save Jobs USA*, Defendant’s Memorandum in Support of Its Motion for Summary Judgment, ECF 27 at 32 (“[ ] 8 U.S.C. § 1324a(h)(3) was drafted to recognize the Attorney General’s authority to grant work authorization.”).

In addition to their cases in the D.C. Circuit, *Amici* are also aware of at least one other case involving the same issues as the instant matter and their cases, specifically *Ariz. Dream Act Coal.* v. *Brewer*, No. 15-15307 (9th Cir. 2014). *Ariz. Dream Act Coal.* involves the Deferred Action for Childhood Arrivals (DACA) program. *See* Pet. pp. 7-8. (describing DACA).[4] The expansion of the DACA program is at issue in the case at bar, as well as the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program, which the lower courts found to be similar to the DACA program. Pet. p. 9. As a result, several of the same issues have been raised in *Ariz. Dream Act Coal.* as in this case.

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[4] Given that DHS has neglected to identify any of these other cases in which it is a party that share common issues with the instant case, it is entirely possible that other pending cases exist that share common issues with *this case* as well.

For example, common issues include the scope of § 1324a(h)(3). *Ariz. Dream Act Coal.* v. *Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014); compare Pet. p. 5 ("Under other longstanding federal law, according aliens deferred action has several consequences. First, aliens with deferred action – like many other aliens whose presence is temporarily countenanced – become eligible for work authorization. 8 C.F.R. 274a.12(a), (b), (c), and (14)."), with *Ariz. Dream Act Coal.* v. *Brewer*, United States' Brief as *Amicus Curiae* Supporting Appellees, No. 15-15307 at 23 (9th Cir. Aug. 28, 2015) ([ ] it was already long-settled that when an alien is accorded deferred action, the alien may also be accorded work authorization. 8 U.S.C. § 1324a(h)(3); 8 C.F.R. § 274a.12(c)(14).").

Employment is not the only common issue between this case and *Ariz. Dream Act Coal.* The question of whether a state must grant illegal aliens driver's licenses is at issue in both cases. *Texas* v. *United States*, No. 15-40238, slip op. at 6-7, 9, 12-14, 16, 18-20, 22, 24-27, 30, 33, 36, 40, 51, 66, 78-79, 82 (5th Cir. Nov. 9, 2015); *Ariz. Dream Act Coal.* v. *Brewer*, 757 F.3d 1053, 1057-59, 1061-64, 1066-68 (9th Cir. 2014); *see also*, *Ariz. Dream Act Coal.* v. *Brewer*, United States' Brief as *Amicus Curiae* Supporting Appellees, No. 15-15307 at 7-18 (9th Cir. Aug. 28, 2015) (asserting that Arizona must provide drivers licenses to illegal aliens receiving deferred action under DACA).

Another common issue is the constitutionality of a blanket grant of deferred action to a class of aliens,

particularly whether it violates the Take Care Clause. Pet. p. 10; *Ariz. Dream Act Coal.* v. *Brewer*, United States' Brief as *Amicus Curiae* Supporting Appellees, No. 15-15307 at 18-19, 25-27 (9th Cir. Aug. 28, 2015).

A third common issue is whether the blanket grant of deferred action is authorized under the INA. Pet. pp. 3, 24-28; *Ariz. Dream Act Coal.* v. *Brewer*, United States' Brief as *Amicus Curiae* Supporting Appellees, No. 15-15307 at 22-28 (9th Cir. Aug. 28, 2015); compare Pet. p. 3 ("'A principal feature of the removal system is the broad discretion exercised by immigration officials.' *Arizona*, 132 S. Ct. at 2499. When they encounter a removable alien, immigration officials, 'as an initial matter, must decide whether it makes sense to pursue removal at all.' *Ibid.*"), with *Ariz. Dream Act Coal.* v. *Brewer*, United States' Brief as *Amicus Curiae* Supporting Appellees, No. 15-15307 at 22 (9th Cir. Aug. 28, 2015) ("The Court has recognized that 'the broad discretion exercised by immigration officials' is '[a] principal feature of the removal system.' *Arizona*, 132 S. Ct. at 2499. Federal officials 'must decide whether it makes sense to pursue removal at all,' *id.*").

In addition to litigating common issues, all three of these cases *Amici* have identified are further advanced in the litigation process: In the case at bar, DHS seeks review of an order granting a preliminary injunction, whereas, in contrast, *Ariz. Dream Act Coal.* is currently awaiting a decision from the United States Court of Appeals for the Ninth Circuit on an appeal from a final judgment, *Wash. Alliance of*

Technology Workers is being briefed before the United States Court of Appeals for the D.C. Circuit on an appeal from a final judgment; and *Save Jobs USA* has been submitted to the district court on cross-motions for summary judgment.

The record in all three of the latter cases has been developed and is fully complete with extensive briefing and analysis on the core issues. The Court should contrast this with the minimal consideration of the issues in the instant case. The Fifth Circuit rejected DHS's argument that § 1324a(h)(3) conferred such authority with a single paragraph of analysis. *Texas*, slip op. at 61-62.[5]

The *Amici* labor associations would be prejudiced if the Court were to consider this issue based upon the Fifth Circuit's minimal analysis, rather than allowing the record to be fully developed in the district and circuit courts. As other federal court cases are further advanced procedurally than this matter and have developed and fully complete records, this Court should deny the writ of *certiorari* and wait for a petition for writ of *certiorari* from one of the

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[5] Given that Petitioner's claimed source of authority for a broad grant of authority is hidden in a definition, limited to one section, that is probably all the analysis the claim deserved. *See, e.g.*, *EPA* v. *EME Homer City Generation*, 134 S. Ct. 1584, 1612 (2014) ("We have repeatedly said that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.'").

evidentially complete cases that are already in the federal appellate pipeline.

II. The question of whether § 1324a(h)(3) confers on DHS co-equal authority with Congress to authorize any class of aliens of its choosing to work will have major implications throughout the immigration system and is not an issue to be lightly considered.

Should the Court adopt DHS's novel interpretation that the definition of the term "unauthorized alien" in § 1324a(h)(3) (and limited in scope to that section) is a legislative grant to the agency of co-equal authority with Congress to permit any alien of its choosing to work in the United States, the decision would have widespread ramifications throughout the immigration system. *This* case and the *Ariz. Dream Act Coal.* case address the issue in the politically charged arena of illegal aliens. However, *Save Jobs USA* and *Wash. Alliance of Technology Workers* show that this new claim of authority under § 1324a would have major implications throughout the immigration system. In particular, affirmation by the Court of such sweeping authority would enable DHS, through regulation, to administratively dismantle the American worker protections built into the INA by Congress since 1952.

The Court should take note of the facts of *Wash. Alliance of Technology Workers*, to better understand the consequences for American workers, including

Amici, should this Court adopt the government's overbroad gloss on § 1324a(h)(3). The H-1B visa program is routinely used to replace American workers in technology fields with lower paid foreign workers. *E.g.*, Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements*, New York Times, June 3, 2015. To protect American workers, Congress has put in place limits on the number of H-1B visas, which in turn limit the number of Americans that can be replaced by such workers. § 1184(g).

In 2007 Microsoft Corporation concocted a scheme to get around the H-1B quota by using student visas instead. *Wash. Alliance of Technology Workers* v. *United States Dep't of Homeland Security*, No. 1:14-cv-529 D.D.C.) (Administrative Record (A.R.) at 120-23). By allowing aliens to work on student visas for 29 months after graduation, such labor could be used in place of an H-1B visa. *Id.* Microsoft presented its scheme to the DHS secretary at a dinner party. *Id.* From there DHS worked secretly with industry lobbyists to prepare regulations implementing Microsoft's scheme. A.R. 124-27, 130-34. The first notice to the public that such regulations were even being considered is when DHS put them in place, *fait accompli*, without notice and comment. Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944-56 (Apr. 8, 2008) (codified at 8 C.F.R. §§ 214, 274a). If the

courts rush to construe DHS's new interpretation of § 1324a(h)(3) without the benefit of a developed evidentiary record as to the identity of the millions of citizens and aliens who will be helped or harmed by such a holding, it is very possible that every protection for domestic labor in the immigration system could thereafter be undermined through regulatory action (or, as in this case, through rules cloaked as policy "guidance," which lack public notice and comment, Pet. pp. I-II, 8-13, 15, 16, 22-26 and 28-35).

Such concern is not based on mere speculation or unsubstantiated fears. History demonstrates that *Amici*'s concerns are well founded. DHS's predecessor, the Immigration and Naturalization Service, had more than once attempted to subvert Congress's intricate statutory American worker protections. *See, e.g.*, *Int'l Union of Bricklayers & Allied Craftsmen* v. *Meese*, 761 F.2d 798 (D.C. Cir. 1985) and *Int'l Union of Bricklayers & Allied Craftsmen* v. *Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985) (Court declared unlawful INS practice of allowing foreign bricklayers to work in the United States on B (visitor) visas rather than the appropriate H-2 (guest worker) visa.[6]); *Int'l Longshoremen's & Warehousemen's Union* v. *Meese*, 891 F.2d 1374 (9th Cir. 1989) (Court declared unlawful INS practice of admitting foreign crane operators to work in the United States on D (crewmen) visas

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[6] The Immigration Act of 1990, Pub. L. No. 101-649, § 205, 104 Stat. 4978, reorganized the H visa category. There is no longer an H-2 visa.

rather than the appropriate H visa.). When challenges were mounted against such agency abuse, the courts rebuffed this overreach. *Id.*

Should the courts endorse DHS's novel theory that the definition of the term *unauthorized alien* in § 1324a(h)(3) is, in fact, a grant to the agency of unlimited authority to allow aliens to work in the United States, industries in search of new sources of cheap foreign labor would no longer have to seek such from the people's elected representatives. Instead, they could merely lobby unelected bureaucrats for special consideration – as has happened in *Amici*'s cases.

CONCLUSION

Amici Save Jobs USA and Washtech pray that, when the Court considers granting the government's Petition for a Writ of *Certiorari* and the scope of the review, the Court consider the other pending cases in the federal courts addressing the same issues that are further along in the litigation process and the broader implications that these cases raise.

Respectfully submitted,

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